No. 83660-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY L. JACKOWSKI and ERI JACKOWSKI, husband and wife,

Appellants.

v.

DAVID BORCHELT and ROBIN BORCHELT, husband and wife; HAWKINS POE, INC., dba Coldwell Banker Hawkins-Poe Realtors; HIMLIE REALTY, INC., VINCE HIMLIE, broker for Windermere Himlie Real estate, real estate brokers, and ROBERT JOHNSON and JEF CONKLIN, real estate agents,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS HAWKINS POE, INC. AND JOHNSON

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I. INTRODUCTION

Respondents Hawkins Poe, Inc., dba Coldwell Banker Hawkins Poe Realtors and Robert Johnson (hereinafter collectively "Hawkins Poe") submit this supplemental brief pursuant to RAP 13.7(d)-(e).

II. ASSIGNMENTS OF ERROR

Assignments of Error

Hawkins Poe assigns no error to the trial court's decision, by which it dismissed all claims of plaintiffs Tim and Eri Jackowski against Hawkins Poe. Hawkins Poe assigns error to the following decisions of Division Two of the Court of Appeals in this action, *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009):

1. Division Two erred in holding that the economic-loss rule does not bar claims of professional negligence against real estate licensees. *Jackowski*, 151 Wn. App. at 14-15.

2, Division Two erred in holding "that chapter 18.86 RCW does not abrogate professional and fiduciary duties of real estate agents." *Id.* at 14.

3. Division Two erred in impliedly holding that RCW 18.86 created a private right of action against a real estate licensee. *Id.*

Issues Pertaining to Assignments of Error

1. Whether the economic-loss rule bars claims of professional negligence against real estate licensees. (Assignment of Error No. 1.)

2. Whether RCW 18.86 abrogated fiduciary duties of real estate licensees. (Assignment of Error No. 2.)

3. Whether a private right of action exists under RCW 18.86. (Assignment of Error No. 3.)

III. STATEMENT OF THE CASE

This Court has accepted review of the decision of Division Two of the Court of Appeals. Hawkins Poe adopts by reference its Statements of the Case in (1) its Brief of Respondents submitted to Division Two, and (2) its Petition for Review submitted to this Court.

IV. SUMMARY OF ARGUMENT

This Court should follow *Berschauer/Phillips v. Seattle Sch. Dist.*, 124 Wn.2d 816, 828, 881 P.2d 986 (1994), apply the economic-loss rule to the Jackowskis' negligence claims against Hawkins Poe, and dismiss those claims as a matter of law. In *Berschauer/Phillips*, the economic-loss rule barred professional-negligence claims that were at issue in that case.

The Jackowskis have no claim against a real estate licensee for breach of fiduciary duty, because RCW 18.86 abrogated any such duty. The statutory duties of real estate licensees that RCW 18.86 enumerates differ markedly from, and replace, fiduciary duties.

RCW 18.86 creates no private right of action; it merely sets forth standards of conduct of real estate licensees. The Legislature evidenced no intent to create any such right of action. The very purpose of RCW

18.86 was to reduce, not expand, the liability of real estate licensees.

V. ARGUMENT

Hawkins Poe adopts by reference its arguments in (1) its Brief of Respondents submitted to Division Two, and (2) its Petition for Review submitted to this Court. Hawkins Poe offers the following supplemental argument in support of reversal of the decision of Division Two and dismissal of all claims against it in this action.

A. The economic-loss rule bars claims of professional negligence.

1. *Berschauer/Phillips* compels dismissal of all claims against Hawkins Poe.

This Court should reverse Division Two's decision, because **Division Two's holding is flatly contrary to this Court's decision in *Berschauer/Phillips*.** In *Berschauer/Phillips*, this Court applied the economic-loss rule to bar claims of professional liability against design professionals and others. 124 Wn.2d at at 828. This Court reasoned, "The economic loss rule marks the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others". *Id.* at 822. At issue in *Berschauer/Phillips* was whether a general contractor could recover economic damages arising from the negligence of an architect, a structural engineer, and a project inspector. Even though the professionals

in *Berschauer/Phillips* have duties and obligations independent of the common law, this Court refused to blur the boundaries of tort and contract to allow a plaintiff to recover purely economic damages where the parties' relationship is contractual. *Id.* at 826.

It is impossible to reconcile *Berschauer/Phillips* with Division Two's reasoning in *Jackowski*. Division Two asserted that the economic-loss rule does not apply to claims of professional negligence, even where the losses are purely economic and where the parties' relationship arises out of contract. Had this Court followed that rationale in *Berschauer/Phillips*, its holding in *Berschauer/Phillips* would have been the opposite of the actual holding. The duties of the defendant engineers in *Berschauer/Phillips* are similar to, if not greater than, those of a real estate licensee. WAC § 196-27A-020 sets forth the rules of professional practice of engineers, including: (1) to be honest, fair and timely; (2) to be objective and truthful; (3) to disclose material facts; and (4) not to knowingly falsify, misrepresent or conceal a material fact in offering or providing services. In addition, WAC §§ 196-27A-020(g) and (i) appear to impose fiduciary duties upon engineers in that an engineer "shall act as faithful agents or trustees" and "shall avoid conflicts of interest, or the appearance of a conflict of interest, with their employers or clients." Despite the existence of these high duties, this Court held that the

economic-loss rule barred professional-negligence claims against engineers, where the damages are purely economic.

In its decision in this case, the Court of Appeals agreed with the Jackowskis' argument that the trial court erred by dismissing the statutory and common-law claims against Hawkins Poe under the economic-loss rule. *Jackowski*, 151 Wn. App. at 15. Division Two first contended that RCW 18.86.110 does not abrogate fiduciary duties of real estate licensees. As shown in § V.B., *infra*, Division Two's interpretation of RCW 18.86 is plainly wrong; the statute did abrogate fiduciary duties of real estate licensees. The Court of Appeals then concluded that allowing expansion of this Court's holding in *Alejandre* to preclude all recovery for economic loss against real estate licensees would eliminate professional-malpractice claims for all cases not involving physical harm. *Id.* at 14. Division Two stated, "We do not believe this to be the *Alejandre* Court's intention." *Id.* Yet Division Two cited nothing, from *Alejandre* or elsewhere, to support that belief. Notably, Division Two wholly ignored this Court's holding in *Berschauer/Phillips*.

Tort law is not designed to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. Thus, the economic-loss rule likewise prohibits a claim for breach of professional duty, especially where the parties are in privity and no relationship would

have existed but for the contract. Division Two erroneously concluded that a breach of one of the duties enumerated in RCW 18.86 is negligence per se making the parties' contract ancillary to the dispute. In both cases, the Court of Appeals failed to examine the significance of the contractual relationship between the parties. With the exception of dual agency, a real estate licensee is either working for a buyer to find a home to purchase or they are working for a seller to market the home and attract potential buyers. In the case of a listing agent, the parties' relationship arises upon the signing of the listing agreement. With a buyer's agent, the parties' relationship is solidified when the buyer enters into a purchase and sale agreement with a seller. The contract is central to the legal relationship between the licensee and the consumer. What remedies are available is a function of what the parties bargain for in their contract. This Court has made clear that the failure to bargain for adequate contractual remedies does not provide a party with an exception to the economic-loss rule. *Alejandre v. Bull,* 159 Wn.2d, 674, 687, 153 P.3d 864 (2007). The Court of Appeals' decision completely ignores the fundamental purpose of the economic-loss rule: To ensure that the allocation of risk and of potential future liability is based on what the parties bargained for in the contract. *See id.*

In addition, the application of the economic-loss rule to claims of

professional negligence against real estate licensees subjects licensees to liability disproportionate to the negligent action. This Court has reasoned:

> If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of risk as secured by contract. The fee charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.

Berschauer/Phillips, 124 Wn.2d at 826-27.

Imposing tort liability on real estate licensees would require them to become the guarantors of the complete satisfaction of home buyers for the duration of their homeownership. Contract claims are subject to a six-year statute of limitation, which accrues at the time of violation. Negligence claims are also subject to a six-year statute of limitation, but in contrast to contract, they accrue when the injury is (or should have been) discovered. In the case of a home buyer, an alleged defect may not become apparent for many years after the transaction has closed. Allowing tort claims to proceed against real estate licensees would result in liability to licensees in an indeterminate amount for an indeterminate time and to an indeterminate class. Parties need to be able to allocate risk through contract, and a real estate licensee should be able to define duties and risks in that contract to predict the cost of doing business.

2. Division One's *Boguch v. Landover* decision does not support the Jackowskis' position.

The Jackowskis might cite the December 21, 2009 decision of Division One in *Boguch v. The Landover, Corp.*, 153 Wn. App. 595, ___ P.3d ___ (2009), to support its position that their claim against Hawkins Poe survives the economic-loss rule. *Boguch* provides no such support. The *Boguch* court cited Division Two's *Jackowski* decision itself in sidestepping the economic-loss rule in a professional-negligence claim against a real estate licensee, *id.* at 618; ignored the *Jackowski* court's failure to cite any supporting authority; and ignored the utter contradiction between that result and *Berschauer/Phillips*. The *Boguch* court did not even mention *Berschauer/Phillips*, the seminal economic-loss-rule decision in Washington. *Boguch* fails to come to grips with the very reason that the economic-loss rule exists, and no persuasive reason exists for this court to follow that decision.

3. Applying the economic-loss rule here would not affect medical- or legal-malpractice claims.

The Jackowskis will argue that if the economic-loss rule bars their professional-negligence claim against Hawkins Poe, then it would bar all professional-negligence claims against all professionals in Washington. Any such argument is false.

For two reasons, the economic-loss rule does not affect medical-malpractice cases whatsoever. First, they do not involve economic losses:

> "[E]conomic losses are generally distinguished from physical harm or ... damage to property other than the defective product or property." *Alejandre*, 159 Wn.2d at 685. In other words, when a product fails to function properly and injures only itself, the loss is an economic loss and the parties are limited to their contract remedies. However, when a defective product injures something other than itself, **such as a person** or other separate property, the loss is not merely an economic loss and tort remedies are appropriate. *See Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213, 969 P.2d 486 (1998).

Stieneke v. Russi, 145 Wn. App. 544, 556, 190 P.3d 60 (2008). Medical-malpractice cases inherently entail physical bodily harm. Therefore, a medical-malpractice plaintiff's claims are not economic losses within the meaning of the economic-loss rule. Second, the Legislature has codified in RCW 7.70 the elements of a medical-malpractice action in Washington and therefore plainly decided that medical-malpractice may proceed. *See generally* RCW 7.70.010, .030.

The economic-loss rule need not impair legal-malpractice claims in any way. Even if this Court applies the economic-loss rule in the present case, it has the "inviolate" power at the same time to hold that it does not apply to legal-malpractice claims.

> [O]ur state constitution vests the judicial power of the State in this court. Const. art. IV, § 1. Under this provision the power of the Supreme Court to regulate the practice of law is inviolate. *City of Seattle v. Ratliff*, 100 Wn.2d 212, 215, 667 P.2d 630 (1983).

Kommavongsa v. Haskell, 149 Wn.2d 288, 311, 67 P.3d 1068 (2003).

Therefore, following the economic-loss rule in the present case does not compel this Court to apply the rule to legal-malpractice claims.

B. RCW 18.86 *et seq.* abrogated fiduciary duties of a real estate licensee.

The Court of Appeals' interpretation of RCW 18.86.110 is wrong for several reasons. First, it cannot be squared with the text of the statute:

> This chapter supersedes only the **duties** of the parties under the common law, **including fiduciary duties** of an agent to a principal, to the extent inconsistent with this chapter. The common law continues to apply to the parties in all other respects.

RCW 18.86.110 (emphasis added).

Second, the very purpose of RCW 18.86 was to change the duties of real estate licensees. As this Court has noted, "In 1996, the Legislature enacted comprehensive legislation which redefined the duties of real estate brokers. RCW 18.86." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 32 n.3, 948 P.2d 816 (1997). By its plain terms, RCW 18.86 enumerates the duties of a real estate licensee to his or her principal in ways that are lower than, and squarely conflict with, the common law of fiduciaries. Those fiduciary duties are "inconsistent with this chapter [RCW 18.86]," which chapter therefore "supersedes the duties of the parties under the common law[.]"

Before the "comprehensive legislation" of RCW 18.86, which "redefined the duties of real estate brokers," *Sing*, 134 Wn.2d at 32 n.3,

real estate licensees owed fiduciary duties to their clients. *Id.* at 31-32 (pre-1997 claim against real estate broker; *Cogan v. Kidder, Matthews & Segner, Inc.*, 97 Wn.2d 658, 648 P.2d 875 (1982) (same); *Mersky v. Multiple Listing Bureau*, 73 Wn.2d 225, 229, 437 P.2d 897 (1968) (same). At common law, fiduciaries owe their principals "the highest degree of good faith, care, loyalty and integrity." *Esmieu v. Hsieh*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977). A fiduciary duty may be breached, although no corruption, dishonesty or bad faith is involved. *Williams v. Queen Fisheries, Inc.*, 2 Wn. App. 691, 695, 469 P.2d 583 (1970). The standard of duty required is for the agent to avoid placing himself or herself in a situation where the agent may be tempted by his or her own private interests to disregard that of his principal, and it is this corrupting tendency the law condemns. *Id.* A fiduciary duty is absolute. *Cogan*, 97 Wn.2d at 663. It requires the fiduciary to "exercise the utmost fidelity and good faith[.]" *Mersky*, 73 Wn.2d at 229. This absolute duty arises from a "legal, ethical, and moral responsibility ... to exercise reasonable care, skill and judgment[.]" *Id.* The fiduciary must "scrupulously avoid representing any interest antagonistic to that of the principal ... or otherwise self-dealing." *Id.* This Court has rejected "attempt[s] to equate a breach of fiduciary duty to a mere breach of contract":

> Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. *As to this there*

> *has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions* ... . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Obert v. Environmental Research, 112 Wn.2d 323, 337, 771 P.2 340 (1989) (italics in original; citations omitted).

Common-law standards of fiduciary liability directly conflict with RCW 18.86. At common law, a fiduciary must **avoid** any possible conflict of interest. *Mersky*, 73 Wn.2d at 229. Yet under RCW 18.86, a real estate licensee need only timely **disclose** a conflict of interest, not avoid it. RCW 18.86.040(1)(b) (seller's agent), .050(1)(b) (buyer's agent), .060(2)(b) (dual agent). Indeed, RCW 18.86 explicitly authorizes several actions by real estate licensees that the common law of fiduciaries otherwise would forbid:

- A seller's agent may show competing properties to prospective buyers of the property of the agent's seller-client. RCW 18.86.040(2)(a).
- A dual agent may do the same. RCW 18.86.060(3)(a).
- Multiple licensees within the same brokerage represent competing sellers in competing transactions involving the same buyer. RCW 18.86.040(2)(b).
- Dual agents may do the same. RCW 18.86.060(3)(b).

- A buyer's agent may show the same property in which a buyer-client is interested to other prospective buyers. RCW 18.86.050(2)(a).
- A dual agent may do the same. RCW 18.86.060(4)(a).
- Multiple licensees within the same brokerage may represent buyers in competing transactions involving the same property. RCW 18.86.050(2)(b).
- Dual agents may do the same. RCW 18.86.060(4)(b).

Indeed, the very notion of dual agency, which RCW 18.86.060 expressly authorizes, is antithetical to fiduciary duties. Under the statute, a real estate licensee may act as agent of both buyer and seller in the same transaction. Such a dual agent inevitably encounters conflicts of interest. In representing the seller, the licensee is supposed to negotiate the highest possible sales price with the fewest contingencies. In representing the buyer, the licensee is to negotiate a low price and warranties against defects. No matter how knowledgeable and trustworthy, a real estate licensee cannot represent both parties in price negotiations at the same time while being held to the standard of a true fiduciary.

The duties of a dual agent set forth in RCW 18.86.060 present an irreconcilable conflict with the most basic duty of a fiduciary, which is to act for the **sole** benefit of another. In a true fiduciary relationship, the fiduciary would be required to disclose all information to his or her

principal that could affect his principal's decisions. This duty to disclose cannot exist in a dual agency relationship. For example, RCW 18.86.060(1)(d) requires that a dual agent not disclose any confidential information from or about either party. If a dual agent became aware of the credit risk of a buyer who was insisting on seller financing, the licensee could not disclose this to the seller. Under RCW 18.86.060(1)(d), the licensee has a non-waivable duty to not disclose this information to the seller, even though it is detrimental to the seller's interests.

The inherent conflicts of interest represented in a dual agency cannot be squared with Division Two's finding that fiduciary duties of real estate licensees survive enactment of RCW 18.86 *et seq.* The plain language of the statute expressly states the act abrogated fiduciary duties and the allowance of dual agency implicitly shows fiduciary duties no longer exist. This dual-agency relationship, while statutorily authorized, cannot possibly be fiduciary in nature.[1]

Similarly, the notion of buyer agency, which RCW 18.86.050 expressly authorizes, usually is antithetical to fiduciary duties. A buyer's

[1] Thus, this Court should ignore the *Boguch* court's erroneous recognition of "common law" duties of a real estate licensee to his client, *Boguch*, 153 Wn. App. at 618, which in fact do not exist after enactment of RCW 18.86.

agent often has an inherent conflict of interest because the licensee is compensated by sharing in commission payable by the seller to the listing broker, pursuant to the listing agreement. More often than not, the commission is a percentage of the selling price of the property. Consequently, both the seller's agent and the buyer's agent have an incentive to close the transaction at the highest possible price. Thus, even the most scrupulous real estate licensees may not always subordinate their interests to those of the buyer. This relationship, while statutorily authorized, cannot possibly be fiduciary in nature.

Therefore, in enacting RCW 18.86, **the Legislature completely replaced the prior fiduciary duties of real estate licensees with new, lower, statutory duties.** If RCW 18.86 abrogated anything, it abrogated the fiduciary duties of real estate licensees.

C. RCW 18.86 does not create a cause of action.

1. The Washington Legislature did not intend to create a private cause of action under RCW 18.86 *et seq.*

Division Two erred in holding that RCW 18.86 creates a private right of action. RCW 18.86 does not expressly do so and contains no evidence of legislative intent to create such a cause of action. In determining whether to recognize an implied cause of action under a statute which provides protection to a specified class to persons but creates no remedy, this Court uses a three-part test: The Court must determine:

(1) whether plaintiff is within the class for whose "especial" benefit the statute was enacted; (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and (3) whether implying a remedy is consistent with the underlying purpose of the legislation. *Bennett v. Hardy,* 113 Wn.2d 912, 920, 784 P.2d 1258 (1990) (citing *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)). When a statute gives a new right and no specific remedy, **the common law will provide a remedy**. *State ex rel. Phillips v. Wash. State Liquor Control Bd.*, 59 Wn.2d 565, 570, 369 P.2d 844 (1962) (emphasis added).

Since *Cort*, the U.S. Supreme Court has followed a stricter test that further limits courts' ability to determine that Congress intended to create a private cause of action. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 743, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979). *See also Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 100 S. Ct. 242 (1979). Since *Cannon*, the primacy of congressional intent has prevailed, and the Supreme Court consistently has held that a private right of action exists only if the statutory text grants such a right, either explicitly or through evidence of clear congressional intent. *See, e.g., Karahalios v. Nat'l Fed'n of Fed Employees*, 489 U.S. 527, 532-33, 109 S. Ct. 1282 (1989) (no private right of action under Title VII of the Civil Reform Act of 1978 for alleged violations of duty of fair representation). The Court has

declined to infer a private right of action from a federal regulatory scheme and has expressly rejected the invitation "to provide such remedies as are necessary to make effective the congressional purpose." *Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Without Congress's clear statutory intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

a. The Legislature did not intend to protect a class of individuals or create rights by enacting RCW 18.86.

As thoroughly explained in Hawkins Poe's Brief submitted to Division Two and in its Petition for Review, RCW 18.86 enumerates the duties of a real estate licensee to persons to whom the licensee renders real estate services. Nothing in RCW 18.86 suggest that the Legislature intended to give such persons a new right of action. The purposes of the act were: (1) to clarify and codify the law of agency as applied to real estate licensees; (2) to define agency relationships consistent with consumers' natural expectations, while retaining flexibility for alternative relationships under appropriate circumstances; (3) to reduce instances of dual agency; and (4) to eliminate vicarious liability and imputed knowledge as to consumers. Simply put, the act was created to clarify the duties of a real estate licensee while maintaining common-law remedies.

b. Legislative intent does not support the creation of an implied remedy.

The second inquiry, whether legislative intent supports the creation or denial of an implied remedy, weighs against the finding of an implied right of action under RCW 18.86. Nothing in the language of the statute, its structure, or its legislative history provides any hint that the Legislature envisioned private lawsuits to enforce the provisions of the act. In fact, the legislative history is completely devoid of any indication that private lawsuits under the act were even briefly contemplated by the Legislature. Under the plain terms of the statute, the act supersedes only the **duties** of the parties. RCW 18.86.110 (emphasis added). The statute expressly retains rights and remedies existing at common law.

c. Inferring a remedy contravenes the purpose of RCW 18.86 *et seq.*

Like the first two factors, the third *Bennett* factor also strongly cuts against implying a private right of action under the act, as doing so would be altogether inconsistent with the underlying purpose in enacting RCW 18.86. The background of the statute encompasses two concerns: The issue of whom a licensee represents in a given transaction, and providing certainty to the public as to a licensee's duties and responsibilities. The purpose of enacting the statute was not to create new rights and remedies for real estate consumers, but rather to clarify and codify the business relationships between real estate licensees and consumers. Real estate

consumers remain free to seek remedies under the common law.

Further support for the conclusion that a breach of RCW 18.86 is not actionable is the express statement in RCW 18.86.110 that "the common law continues to apply in all other respects" (*i.e.*, rights and remedies). In short, the Legislature purposely omitted any provision for remedies for violation of RCW 18.86. That omission is proof of the Legislature's intent, and that intent governs. When enacting RCW 18.86, the Legislature could have expressly provided for a private right of action but clearly chose not to. Therefore, an expansion of remedies is both inconsistent with the express language of the statute and unnecessary. Thus, this Court should adhere to the plain language of the statute and not imply a cause of action where one does not exist.

VI. CONCLUSION

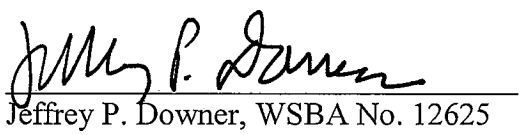
The economic-loss rule bars the Jackowskis' negligence claims against Hawkins Poe. purpose of RCW 18.86 is to codify and clarify the duties of a real estate licensee in the State of Washington while maintaining common law remedies for consumers. The statute does not provide for a private cause of action for a breach of one of the enumerated duties, nor did the Legislature intend that such a right be implied. RCW 18.86 also abrogated fiduciary duties of a real estate licensee in Washington. The plain language of the statute and the allowance of "dual

agency" make this clear.

In addition, the fact that losses implicate statutory duties provides no exception to the economic-loss rule. Creating such an exception threatens to destroy all incentive for contracting parties to bargain for enhanced risk protection. It also subjects real estate licensees to unexpected liability which in turn will increase the cost of doing business. Ultimately, these expenses are passed on to the real estate consumer.

RESPECTFULLY submitted this 23rd day of March, 2010.

LEE SMART, P.S., INC.

By: 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on March 24, 2010, I caused service of the foregoing pleading on each and every attorney of record herein:

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